IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.603 OF 1981

1. Bai Asmabai Moiz Matcheswala
also of Bombay Muslim Inhabitant
residing at 157, Nagdevi Street,
2nd Floor, Bombay-400 008.

2. (1) Bai Khatija Yusuf Bastawala
also of Bombay Muslim Inhabitant
residing at 239, Nagdevi Street,
4th Floor, Darukhanawala Bldg,
Bombay.

3. (2) Bai Mariam Mohmed Hakim
also of Bombay Muslim Inhabitant
residing at 165, Vasi Building,
5th Floor, Nagdevi Street,
Bombay ....Plaintiffs

V/s.

1. Bai kulsumbaiwidow of Kurbanhusein
Chatriwala of Bombay Muslim
Inhabitant residing at Abbas
Manzil, 4th Floor, Bhusari
Moholla, Sarang Street, Bombay.

1(a) Mrs.Fatimabai Abdeali Dohandwala
also of Bombay Muslim Inhabitant
residing at Abbas Manzil,
4th Floor, Bhusari Moholla,
Sarang Street, Bombay-400 003.

1(b) Bai Asmabai Moiz Matcheswala
also of Bombay Muslim Inhabitant
residing at 157, Nagdevi Street,
2nd Floor, Bombay-400 003.

1(c) Bai Khatija Yusufi Bastawala
also of Bombay Muslim Inhabitant
residing at 239, Nagdevi Street,
4th Floor, Darukhanawala Bldg,
Bombay.

1(d) Bai Mariam Mohmed Hakim
also of Bombay Muslim Inhabitant

residing at 165, Vasi Building,
5th Floor, Nagdevi Street,
Bombay- 400 003.

2. (1) Mrs.Fatimabai Abdeali Dahodwala
also of Bombay Muslim Inhabitant
residing at Abbas Manzil,
4th Floor, Bhusari Moholla,
Sarang Street, Bombay-400 003.

(2) Moiz Salehbhai,
155 Husena House,
Nagdevi Street, Mumbai-400 003

(2A) Fatema Salehbai Matcheswala
93 years old Indian Inhabitant
residing at Swastik Chambers,
N.B. Estate, Virar (West),
401 303, District Thane ....Defendants

WITH

SUIT NO.709 OF 1984

1. Kurban Husein Tayabally & Co.
a partnership firm duly
registered under the provisions
of the Indian Partnership Act
carrying on business at 246,
Janjikar Street, Near Jumma
Masjid, Bombay- 400 003.

2. Kulsumbai w/o Kurban Husein
Chatriwala

3. Abdeali F. Dahodwala

4. Fakruddin Abdeali Dahodwala,

All of Bombay Indian Inhabitants,
residing at Abbas Manzil,
4th Floor, Bhusari Mohalla,
Sarang Street, Bombay-400 003. ....Plaintiffs

V/s.

1. Bai Asmabai Moiz Matcheswala,

of Bombay Muslim Inhabitant,
residing at 157, Nagdevi Street,
2nd Floor, Bombay-400 003.

2. Bai Khatija Yusufi Bistwala,
also of Bombay Muslim Inhabitant,
residing at 239, Nagdevi Street,
4th Floor, Darukhanawala Building,
Bombay-400 003.

3. Bai Marim Mohmed Hakim,
also of Bombay Muslim Inhabitant,
residing at 165, Vasi Building,
5th Floor, Nagdevi Street,
Bombay-400 003.

4. Bai Fatemabai Abdeali Dohadwala,
of Bombay Muslim Inhabitant,
residing at Abbas Manzil,
4th Floor, Bhusari Mohalla,
Sarang Street, Bombay-400 003.

5. The Court Receiver,
High Court, Bombay. ....Defendants

Mr.H.J. Thakkar with Mr.A.S. Chandurwala and Mr.C.M. Gaonkar i/b Desai & Diwanji for the Plaintiffs in Suit No.603 of 1981 and for the Defendants in Suit No.709 of 1984.

Mr.A.N. Maniyar for the Defendants in Suit No.603 of 1981 and for the Plaintiffs in Suit No.709 of 1984.

CORAM : S.J. VAZIFDAR, J.
DATED : 5TH/6TH AUGUST, 2004.

ORAL JUDGMENT :

1. By consent of the parties, both the suits will be disposed of by this common judgment.

2. At the out-set, it would be convenient to set

out the parties to the suit. I will first refer to the parties in Suit No.603 of 1981. One Kurbanhusein T. Chhatriwala (hereinafter referred to as the deceased) was the husband of original Defendant No.1 and the father of original Plaintiff No.1, and Plaintiff Nos.2 Bai Khatija Yusuf Bastawala and Bai Mariam Mohmed Hakim and Defendant No.2 Fatema Salebhai Matcheswala.

3. I will now refer to the parties in Suit No.709 of 1984. Plaintiff No.2 is original Defendant No.1 in Suit No.603 of 1981. Plaintiff Nos.2 and 3 are the husband and son of Defendant No.2 in Suit No.603 of 1981. Plaintiff No.1 is a firm of which the other Plaintiffs claim to be partners. Defendant Nos.1 to 4 are original Plaintiff No.1, Plaintiff Nos.2, 3 and original Plaintiff No.1 (a) in Suit No.603 of 1981. Defendant No.5 is the Court Receiver.

. The heirs of the deceased parties were brought on record. Some of the heirs also having expired their heirs were brought on record. There is however some error in the manner in which they were impleaded. This however need not detain me as ultimately I intend declaring the share of each branch only viz. the branches of the original parties to

Suit No.603 of 1981 as this suit is for the administration of the estate of the deceased only. I may add here that counsel for all the parties stated that there are now neither any heirs of original Plaintiff No.1 nor any heirs of her heirs.

4. Suit No.603 of 1981 is filed for the administration of the estate of the deceased; for ascertaining the shares of the parties in the estate of the deceased ; for a direction against Defendant No.2 to render to the Plaintiffs' true and faithful accounts of the estate of the deceased on the footing of willful default ; for an order against the Defendants to forthwith disclose the whole estate of the deceased come to their hands and taken charge of by them and for all necessary directions.

5. Suit No.709 of 1984 is filed for a declaration that the first Plaintiff firm and its properties and assets are the assets of Plaintiff Nos.2, 3 and 4 as the partners of the first Plaintiff firm and that the same do not form a part of the estate of the deceased ; for a declaration that the amounts lying to the credit of the Plaintiffs' firm with Grindlays Bank belongs to the first Plaintiff and that the amount of Rs.93,494=96 ps. drawn by the

Court Receiver from the said account pursuant to the order of this Court also forms part of the assets of the first Plaintiff firm and that the Plaintiffs are entitled to the refund of the same and for a decree in the sum of Rs.1,50,000/- as damages.

6. The decision in Suit No.603 of 1981 will affect the decision in Suit No.709 of 1984. I will, in this judgment, refer to the parties as they are arrayed in Suit No.603 of 1981.

7. The Plaintiffs' case is that the deceased - Kurbanhusein died intestate in Bombay on 5th August, 1980 leaving his daughters, the Plaintiffs and original Defendant No.2 and his widow, original Defendant No.1, as his heirs and next-of-kin according to Shia Mohammedan Law ; that all the assets of the business and goodwill as also the personal properties of the deceased belong to the estate of the deceased and his heirs are entitled to the same in accordance with Shia Mohammedan Law by which the parties are governed. In Shia Mohammedan Law, original Defendant No.1 being the widow of the deceased, was entitled to a one eighth share in the estate of the deceased and his daughters were entitled to the balance equally. There is no dispute regarding the proportion of the

share of each of a parties in the estate of the deceased.

. The Plaintiffs' case is that the deceased was carrying on the business of umbrellas in the name and style of M/s.Kurbanhusein Tyaballi as the sole proprietor thereof. In addition thereto, the deceased left an immovable property viz. "Karim Building", Mumbai, a bank balance in the account with the Grindlays Bank Ltd., Mumbai and the stock of the said firm. The Plaintiffs' case is that the original first and second Defendants failed and neglected to divide the estate of the deceased and give them their respective shares therein inspite of their demands by their advocate's letter dated 11th March, 1981. It is in these circumstances, that the Suit No.603 of 1981 was filed.

8. The original Defendants filed a common written statement. In addition to certain formal grounds, their case therein was that the deceased was carrying on the business in partnership with defendant No.1 under a Deed of Partnership dated 11th January, 1980. Upon the death of the deceased, Defendant No.1, in accordance with clause 8 of the Deed of Partnership dated 11th January, 1980, became the sole proprietor

of the business and was accordingly entitled to continue the same. The Defendants' case was that the estate is entitled to Rs.71,500/- being the amount due to the deceased as a partner of the firm. The Defendants admitted that the deceased left "Karim Building". It is admitted that the deceased died intestate. The Defendants further stated that upon the death of the deceased, Defendant No.1 observed Iddat (Seclusion) for a period of four and a half months. Upon coming out of the Iddat in January, 1981, the heirs decided to sell the immovable property and the sale thereof was entrusted to the husband of Plaintiff No.3. The Defendants' case is that it was agreed between all the heirs that after disposing of the immovable property viz. "Karim Building", the sale proceeds would be added to Rs.71,500/- being the amount of the share of the deceased and the same would be distributed amongst the heirs according to law.

9. Thus far, it will be noticed that there are five facts admitted by all the parties. Firstly, the deceased was the husband of original Defendant No.1 and the father of the Plaintiffs and Defendant No.2. Secondly, during his life time and upto 10th January, 1980 at least, the deceased carried on the business of umbrellas in the name and style of M/s.Kurbanhusein

Tyaballi as the sole proprietor thereof. Thirdly, the deceased died intestate. Fourthly, the parties are governed by Shia Mohammedan Law under which the original Defendant No.1, widow of the deceased, was entitled to a one eighth share in the estate of the deceased and the Plaintiffs and defendant No.2 were entitled to an equal share in the remaining estate of the deceased. Lastly, the deceased was a tenant of the premises 246, Janjikar Street, Crawford Market, (near Jumma Masjid) Mumbai from where he carried on the said business.

10. Thus, declaring the shares of the parties in the estate of the deceased poses no difficulty. It is in fact admitted. Three critical questions common in both the suits are :

i) Whether in fact the deceased and original Defendant No.1 entered into a partnership business on the terms and conditions contained in and as evidenced by a Deed of Partnership dated 11th January, 1980.

ii) Assuming that the answer to the first question is in the affirmative, whether the said premises was brought into the alleged

partnership firm by the deceased, and

iii) The effect of the death of the deceased on the alleged firm qua the rights of the estate of the deceased therein. The answer to this question will depend upon the construction to be placed on Clauses 8 and 9 of the Deed of Partnership dated 11th January, 1980.

11. D.K. Deshmukh, J. settled the following issues :-

. **Issues in Suit No.603 of 1981** :

1) Whether the suit as filed lacks cause of action alleged in para 1 of the written statement ?

2) Whether the suit is not properly valued as alleged in para 2 of the written statement ?

3) Whether the firm of M/s.Kurbanhusain Tyaballi and Co. was a genuine partnership firm constituted under a deed of partnership

dated 11.1.1980 and consisting of the deceased Kurbanhusain and the deceased defendant No.1 as alleged in para 3 of the written statement ?

4) Whether the deceased Kurbanhusain carried on business till his death as a sole proprietor of M/s.Kurbanhusain Tyaballi and Co. in a shop at 246, Janjikar Street, Near Juma Masjid, Bombay as alleged in para 1 of the plaint ?

5) Whether the decease Kurbanhusain had left a bank account with large balance in Grindlays Bank Ltd., Princess Street Branch as alleged in para 5 of the plaint ?

6) What share each of the Plaintiffs and the Defendants are entitled to in the estate of deceased Kurbanhusain ?

7) What reliefs ?

12. Smt.K.K. Baam, J. settled the following issues :-

. **Issues in Suit No.709 of 1984 :**

1) Whether the suit is not maintainable and liable to be dismissed with compensatory costs as alleged in paras 20 and 23 of the written statement ?

2) Whether the Defendants prove that the deceased was lying ill under Mazzul - Maut for nearly one year prior to his death as alleged in paras 1 and 14 of written statement ?

3) Whether the said deceased took the Plaintiff No.2 as his partner in his business of Umbrellas and entered into Deed of Partnership as alleged in para 2 of the Plaint ?

4) Whether the business of M/s.Kurban Husain Tayaballi was continued after the death of Kurban Husain by the Plaintiffs 2, 3 and 4 as partners as alleged in para 9 of the Plaint ?

5) Whether the first Plaintiff firm and its properties and assets do not form part of the

estate of the said deceased as alleged in para 13 of the Plaint ?

6) Whether the Plaintiffs are entitled to claim damages to the extent of Rs.1,50,000/- from the Defendants as alleged in para 14 of the Plaint ?

Issue No.2 is recast today. (17.2.2003)

7) Whether the alleged Partnership Deeds dated 11.1.1980 and 10.1.1981 relied upon by the Plaintiffs and Defendant No.4 are not valid and binding upon the Defendant Nos.1 to 3 for the reasons alleged in para 1 and 14 of the Written Statement ?

8) Whether the Deed of Partnership dated 10th January, 1981 was bogus and got up by the Plaintiffs 2, 3 and 4 in an attempt to deprive the Defendants of their share in the business of the deceased as his heirs as alleged in paras 7, 8, 12, 14, 15 and 16 of the Written Statement ?

9) Whether the deceased left a large bank

balance in his account with Grindlays Bank at Princess Street Branch and stock of umbrellas of the business of Kurbanhusain Tayaballi and Co. as alleged in para 2 of the Written Statement ?

10) Whether the Mama Traders has been allowed to carry on business in half the portion on ground floor of the premises as licensees and failed to pay royalty amount at the rate of Rs.4000/- per year for the last six years and became trespassers as alleged in para 13 of the Written Statement ?

11) What orders ?

13. J.A. Patil, J. (as he then was) recorded in the notes of evidence of 17th February, 2003, that the parties had agreed that the evidence recorded in each suit, may be read as evidence recorded in the other.

Issue Nos.3 and 4 in Suit No.603 of 1981 and 2, 3, 7 and 8 in Suit No.709 of 1984 :

14. The main question is whether the Deed of Partnership dated 11th January, 1980 was entered into

between the deceased and original Defendant No.1. After the death of the deceased, it is alleged that Plaintiff Nos.2, 3 and 4 in Suit No.709 of 1984 constituted a fresh partnership under a Deed of Partnership dated 10th January, 1981 and carried on the business in the name and style of Plaintiff No.1. The Plaintiffs in suit No.603 of 1981 are not concerned in any manner with the Deed of Partnership dated 10th January, 1981. The same cannot, therefore, affect the rights of the Plaintiffs in Suit No.603 of 1981 in any manner whatsoever. This is even assuming that the Deed of Partnership dated 10th January, 1981 is not bogus or a got up document. The main controversy between the parties is whether the business premises of which the deceased was a tenant, was brought into the stock of the partnership constituted between himself and his wife. If the answer to that question is in the negative, the Deed of Partnership dated 10th January, 1981 can confer no rights in respect of the said premises in favour of the Plaintiffs in Suit No.709 of 1984 in any manner and to any extent, for the Plaintiffs in Suit No.603 of 1981 were not parties therein nor acquiesced thereto.

15. The main question, therefore, is whether the

deceased and Defendant No.1 constituted themselves as partners on the terms and conditions contained in and evidenced by the Deed of Partnership dated 11th January, 1980.

16. In the first instance, Mr.Maniyar, the learned counsel appearing on behalf of the Defendants in Suit No.603 of 1981 and on behalf of the Plaintiffs in Suit No.709 of 1984 relied upon an extract from the Registrar of Firms. It has been marked in evidence as Exhibit 14. I invited the attention of both the counsel to the provisions of Sections 58 and 59 of the Indian Partnership Act, 1934 as well as the judgment in the case of - *Firm Het Ram Padam Chand versus Firm Subhag Chand Rikhab Das and others, A.I.R. 1941 Oudh 376* where it was held as under :-

> "It was strongly argued that the certificate of registration is of no evidentiary value because it is not proved that the application for registration bore Het Ram's signature. But we see no reason to reject the view taken by the District Judge on this point that the registration of a firm raises a presumption that the parties shown as members of the firm and registered as such are actually members of it. The presumption is no doubt rebuttable, but the appellant made no attempt to rebut it. If in fact Padam Chand was not Het Ram's partner, there might have been some indication of this in Het

> Ram's private accounts, but those accounts were not produced. Section 58, Partnership Act, provides that for the registration of a firm an application must be made to the Registrar in a certain form giving certain particulars, and the statement must be signed by all the partners, or their agents specially authorized in this behalf. Each person signing the statement must verify it in the manner prescribed. Section 59 provides that when the Registrar is satisfied that the provisions of S.58 have been duly complied with, he shall record an entry of the statement in a register called the register of firms, and shall file the statement. Section 68 provides that a certified copy of an entry relating to a firm in the register of firms may be produced in proof of the fact of the registration of such firms, and of the contents of any statement, intimation or notice recorded or noted therein. We have given full consideration to the argument advanced by the learned counsel for the appellants that nevertheless it was necessary for the respondents to prove that the application for registration bore Het Ram's signature, but we are unable to accept it. In our opinion no further proof was necessary in the absence of any evidence to the contrary."

17. I am in respectful agreement with the ratio of this case. There is no provision in the Indian Partnership Act to the effect that the certificate of registration is conclusive proof of the particulars stated therein. The provisions of the said Act do not

warrant such a conclusion by necessary intendment either. In fact the procedure for registration clearly establishes that the presumption as to the correctness of what is stated in the certificate of registration is rebuttable. There is every possibility of a person furnishing incorrect information to the Registrar of Firms. The procedure prescribed for registration does not prescribe adequate, much less an absolute, safeguard against such registration especially qua third parties. The provisions of Section 68 clearly support this view. Section 68 reads as under :-

> "**68. Rules of evidence.** - Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated.
>
> (2) A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein."

. Thus under sub section (1) once it is established that a person had signed a statement, intimation or notice which was recorded or noted on

the Register of Firms the contents thereof constitute "conclusive proof" against such person and not against third parties. This is clearer from the fact that on the other hand under sub section (2) such contents of the said documents are not conclusive proof. Had it been otherwise the language of sub section (2) would have been different. In the circumstances, it follows that the presumption as to the correctness of the contents of the certificate of registration under the Indian Partnership Act is rebuttable.

18. The position therefore is that there is a presumption in favour of the Defendants that a partnership as contained in the Deed of Partnership dated 11th January, 1980 was entered into. The presumption is however rebuttable. In that case, however, it is clear that the parties made no attempt to rebut the presumption and there was a clear finding that there was absence of any evidence to the contrary. For that reason, the Division Bench sought no reason to reject the view taken by the District Judge on the point that the registration of the firm raised a presumption that the parties shown as the members of the firm and registered as such were actually the members of it.

. It is necessary therefore, to see whether in the facts and circumstances of the present case, the presumption has been rebutted by evidence to the contrary. I have come to the conclusion that it has.

19. On behalf of the Defendants, Fakhruddin Abdeali Dohadwalla (Plaintiff No.4 in Suit No.709 of 1984) was examined. Fakhruddin filed four affidavits by way of examination-in-chief dated 23rd September, 2002, 24th February, 2003, 4th March, 2003 and 28th November, 2003. In paragraph 1 of his affidavit dated 23rd November, 2002, he stated that the deceased was carrying an umbrellas business under the name and style of Messrs Kurbanhusen Tayaballi from the said premises. In paragraph 2, he stated that on 11th January, 1980, the deceased entered into a partnership agreement with Defendant No.1 and that they continued to carry on the business of umbrellas in partnership from the said premises till the death of the deceased. He produced the original Deed of Partnership dated 11th January, 1980 from the custody of the Court Receiver and stated that the context thereof are true and correct. He stated : "I identify the thumb impression of the said deceased and the signature of Kulsumbai - original Defendant No.1 on the said partnership agreement dated 11th January, 1980". On

this statement, the learned Judge who recorded the evidence admitted the Deed of Partnership and marked it as Exhibit-8 in evidence.

20. It did not take much for Mr.Thakkar, the learned Senior counsel appearing on behalf of the Plaintiffs in Suit No.603 of 1981 and on behalf of the Defendants in Suit No.709 of 1984, to destroy this testimony. In paragraph 3 of the cross-examination, Fakhruddin admitted that he was neither a party nor a witness to the Deed of Partnership dated 11th January, 1980. He admitted that he was not present when the document was executed. He admitted that the thumb impression appearing thereon was not put in his presence. He admitted that he had not studied the science of finger prints. Nor was he in a position to identify the thumb impression of the deceased. Thus it was conclusively established that Fakhruddin had no personal knowledge whatsoever of the execution of the Deed of Partnership dated 11th March, 1980. The statement in his examination-in-chief identifying the thumb impression of the deceased was not correct.

21. Faced with this cross-examination, Fakhruddin alleged for the first time in the cross-examination that the deceased had informed him that he had put his

thumb impression on the document. He then admitted that this was the only basis on which he had stated that the Deed of Partnership bears the signature of the deceased. Considering all the surrounding circumstances of the case, to which I shall refer, it is difficult to accept Fakhruddin's evidence that the deceased told him that he had put his thumb impression on the Deed of Partnership. This was not stated in his examination-in-chief. He does not even state in what circumstances and for what reason the deceased informed him that he had put his thumb impression on the Deed of Partnership.

22. In cross-examination, Fakhruddin stated that the deceased did not know English and that he used to sign all the documents in connection with his business and banks in Gujarathi. This cross-examination is extremely important. If according to Fakhruddin, the deceased signed all the documents in connection with his business and banks in Gujarathi, surely some explanation was called for as to why his thumb impression was placed on a document as important and formal as a Deed of Partnership. There is none.

23. Mr.Thakkar did not leave his cross-examination at that. He gave the witness an

opportunity to explain why the deceased placed his thumb impression on the Deed of Partnership. To this question, the answer was he did not ask the deceased as to why he put his thumb impression instead of his signature on the Deed of Partnership.

24. Further it is extremely important to note that Fakhruddin stated that the Deed of Partnership was executed in the office of the advocate. He was not present in the office of the advocate when the document was allegedly executed. He stated that Defendant No.1 and the deceased had gone to the office of the advocate. In these circumstances and considering the fact that the Defendants were aware of the denial of execution of the Deed of Partnership, the least that was expected was for the Defendants to have led the evidence of a finger print expert and to have examined the advocate. They did neither.

25. The Defendants relied upon a document, Exhibit 12. It is a letter allegedly addressed by the deceased to the Police Commissioner and the Municipal Commissioner for Greater Bombay. It is alleged to contain the left hand thumb impression of the deceased. I am not for a moment suggesting at this stage that it is established that Exhibit 12 bears

left hand thumb impression of the deceased. It is the Defendants' uncorroborated case that it does. In these circumstances, the Defendants ought to have led the evidence of a finger prints expert to establish at least that the two thumb impressions are the same. There is no explanation why this was not done. It is however obvious that this too would not have carried the Defendant's case further as it was not established that even this thumb impression was that of the deceased.

26. Further Exhibit 12 is a curious document. It purports to be the original. There is no explanation how the Defendants obtained the original document if in fact it was addressed to the Police Commissioner and the Municipal Commissioner for Greater Bombay. Neither of those parties was summoned to produce the document. In his further examination-in-chief, Fakhruddin stated : "I now produce the original reply dated 22.1.1980 given by Kurbanhusein (deceased) to the Police Commissioner and the Municipal Commissioner for Greater Bombay. This letter bears the thumb impression of Kurbanhusein". On the basis of this evidence, the document was marked in evidence as Exhibit 12. Firstly, as stated above, the witness' statement that the document bears the thumb impression

of the deceased is not correct, to say the least. He is in fact, as noted earlier, not in a position to identify the thumb impression. He does not state how he obtained possession of this original document, if the same was addressed to the Police Commissioner and the Municipal Commissioner Greater Bombay. He relied upon Exhibit '12' to indicate that there was another document which the deceased executed by affixing his thumb impression instead of by signing the same. The reliance is totally unfounded. The execution of the document has not been proved. Indeed, the circumstances in which the Defendants obtained the document has, to say the least, not been proved. It would, in this connection be useful to recollect that in cross-examination, the witness admitted : "He (deceased) used to sign all the documents in connection with his business and banks in Gujarathi." Exhibit 12 was addressed to the Police Commissioner and the Municipal Commissioner for Greater Bombay granting his no objection to their giving one of his tenant's permission to use his premises as a guest house on certain conditions. This was certainly a business document. There is no explanation why it was executed by affixing the thumb impression. The reliance upon Exhibit 12 dated 22.1.1980 on the basis that it is a document contemporaneous to the Deed of

Partnership dated 11.1.1980 is therefore of no assistance to the Defendants.

27. The other obvious and most important evidence that the Defendants were expected to lead was the evidence of the advocate in whose office the deceased and Defendant No.1 allegedly executed the Deed of Partnership. It is significant that the advocate was not examined. There is no explanation why the Defendants failed to examine the advocate. Mr.Maniyar sought to tender an extremely curious explanation during the course of argument. He stated that the advocate was not examined as he had expired. He submitted that I ought to take judicial notice of this fact. He however did not state on what basis I should take "judicial notice" of this fact. He did not even state the date on which the advocate had expired. He did not even care to produce the advocate’s roll assuming that would have been sufficient. He did nothing to establish either that the advocate had expired or the date on which he allegedly expired.

28. I must therefore draw an adverse inference against the Defendants to the effect that had they led the evidence of a finger prints expert and had they examined the advocate their evidence would not only

not have supported the Defendants' case but would have militated against their case.

29. Mr.Maniyar then relied upon a letter dated 22nd May, 1981 addressed by the Grindlays Bank Ltd. to the Plaintiffs' advocate in reply to their letter dated 14th May, 1981. The bank states in the letter that the account which the deceased maintained with them was not his sole account but was of the partnership account and that Defendant No.1 was the only other partner. Thereafter the bank stated as follows :-

> "In terms of the Partnership Deed dated 11.1.1980 signed by the parties, it was provided that the death of a partner would not dissolve the partnership but the shares of the deceased therein would be taken over by the surviving partner. Accordingly on the death of Mr.Kurbanhusain Taiyebali on 5th August, 1980, the surviving partner Mrs.Kulsumbai Kurbanhusain took over the assets of the firm and she is now operating the firm's account with us with 2 other partners".

30. The letter does not support the Defendants' case. The Defendants did not examine any officer of the bank. The Defendants did not even call upon the bank to produce the documents/record of the account in its possession. In any event, the letter of the bank cannot by any stretch of imagination establish the execution of the Deed of Partnership of the deceased in the facts and circumstances of the case. In the facts and circumstances of the present case, considering the preponderance of probabilities, I am not inclined to hold that the execution of the Deed of Partnership dated 11th January, 1980 is established by this document.

31. Mr.Maniyar then relied upon Exhibit-AA which comprises of 35 bills. The bills are on the letterheads of third parties. The bills issued by such third parties are allegedly to "M/s.Kurbanhusein Tyaballi & Co." in respect of umbrellas sold and delivered by them. I use the word "allegedly" because admittedly the witness added the words '& Co.' in his handwriting. Fakhruddin in his cross-examination conducted on 28th November, 2003 admitted that in some of the bills he added the words "& Co." in his handwriting. It was suggested by him that the words "& Co." were added by him to show that the business

was carried on by the alleged partnership firm and not by the deceased as a sole proprietor. This he ought never to have done. I stop short of stating that the documents were tampered with for it is not clear when he altered them. They are unreliable to establish the partnership.

32. I do not see how these bills advance the Defendants' case regarding the Deed of Partnership dated 11th January, 1980 in any manner. The mere fact that they addressed the bills to M/s.Kurbanhusein Tyaballi & Co. at the same premises is of no consequence. The deceased carried on the business even as a sole proprietor under the same firm name and style though without the words "& Co.". The Respondents have not produced any letterheads or bills used by the sole proprietary concern of the deceased. In fact production of these bills and the absence of any bills on the letter heads of the alleged partnership firm and of the sole proprietary firm is a fact against the Defendants. They have not produced any documents by way of letter heads, bills, vouchers, challans or correspondence pertaining to the alleged partnership firm of 11th January, 1980 and the sole proprietary firm. The absence of such documents is a strong indication against the Defendants' case.

33. In his affidavit dated 28th November, 2003, by which he sought to prove Exhibit-AA, Fakhruddin stated that he was conducting the business of the deceased during his life time along with him ; that he was fully acquainted with the business of the deceased ; that he had personal knowledge of all the transactions of his business ; that he was therefore in a position to prove all the documents by stating that the contents thereof were true and correct and by identifying the contents thereof as he had personal knowledge of the transactions referred to therein. If this witness was deeply involved in the business of the deceased, one wonders why he did not produce any documents of the nature I have referred to above.

34. Mr.Maniyar then relied upon Exhibit-S which is an entry in the alleged books of account of the partnership firm. It is agreed between the counsel that the entry is made on the credit side ("Jama") on 10th March, 1980 and that it indicates a credit of Rs.35,000/- in the name of Defendant No.1. (Actual name in the books is Kursanbai which is not the name/spelling of the first Defendant’s name but Mr.Thakkar fairly agrees to proceed on the basis that it refers to original Defendant No.1). Mr.Maniyar,

relying upon this entry, stated that it pertains to the capital brought by original Defendant No.1 into the partnership firm, constituted under the Deed of Partnership Dated 11th January, 1980. I am unable to accept this submission for several reasons.

35. The entry appears in the cash book and not in the ledger. The entry does not indicate the purpose for which the amount was allegedly paid by original Defendant No.1 to the partnership firm. In fact the books of account themselves do not establish that they pertain to the alleged partnership firm. The ledger has not been produced. The amount could have been paid for any reason such as a loan or repayment of a loan or even a deposit. In the absence of any other evidence, it is impossible to arrive at conclusion as to on what account the same was paid. The Defendants did not produce the records of the bank to show the deposit of the amount which is alleged to have been made by cheque. The defendants have not produced the pay in slip book pertaining to this entry. Fakhruddin himself in paragraph 26 of the cross-examination does not offer any explanation on what account the money was paid by original Defendant No.1 to the partnership firm.

36. The entry could appropriately have been explained by the witnesses' father Abedeali. He is Plaintiff No.3 in Suit No.709 of 1984. The witness in his cross-examination admitted that the entry Exhibit-S was made by Abedeali, who was the manager of the firm. In fact all the entries had been made by Abedeali. There is no explanation why Abedeali was not examined. The witness admitted in the cross-examination that Abedeali is a partner of the new firm constituted by a Deed of Partnership dated 10th January, 1981 and that he is alive. The Defendants having failed to examine Abedeali, justifies an adverse inference that he did not examine himself as a witness as his evidence would have been detrimental to the Defendants' case.

37. Mr.Thakkar submitted that the books of account were in fact not proved. He relied upon Section 34 of the Indian Evidence Act in support of his case. Section 34 of the Evidence Act reads thus:-

> "**34. Entries in books of account when relevant. -** Entries in books of account regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with

liability."

. I do not for a moment suggest that there is no force in the submission. However, in view of the fact that the books of account have been admitted in evidence, this argument is not open to him. The Plaintiffs' remedy, assuming that the submission is well founded, is to challenge it in appeal.

38. However, I am inclined to accept Mr.Thakkar's submission that the books of account are not reliable and do not advance the Defendants' case in the present proceedings.

39. In *Dadarao versus The State of Maharashtra, AIR 1974 Supreme Court 388*, relied upon by Mr.Thakkar, the Appellant was an accused before the Judicial Magistrate being tried under Section 408 of the Indian Penal Code on the charge of breach of trust in respect of a sum of Rs.7000/-. The Appellant was a manager of a Samiti, that had offices at two locations. The amounts received at one location used to be carried to the head office by an employee. In the daily cash book maintained at one location, an entry used to be made showing the amount despatched to the head office and mentioning the name

of the person through whom the amount was sent. The head office would normally send the receipt to the branch office the next day and then the branch office would give the number to the said receipts serially. In the course of these transactions, it was alleged that the Appellant misappropriated a sum of Rs.7,000/-. There was no direct evidence for entrustment to the Appellant. The Respondent further produced the books of account of the head of the office and the branch office. The books of the branch office contained a debit entry, showing that a sum of Rs.7,000/- was given to the Appellant for being taken to the head office. The Supreme Court however, held that a mere entry, in support of any oral evidence cannot prove entrustment. The Supreme Court held as under :-

> "5. The High Court has rightly observed that there is no direct evidence of entrustment to the appellant. We have gone through the record in order to find whether there is any in-direct evidence of entrustment but we see none. All that the prosecution did was to produce the books of account of the Chikhli head office and of the Buldana branch. There is a debit entry in the books of the Buldana branch showing that a sum of Rs.7000/- was given to the appellant on November 10, 1965 for being taken to the head office but the mere

> entry, unsupported by any oral evidence cannot prove entrustment. Section 34 of the Evidence Act says that entries in books of account, regularly kept in the course of business are relevant but such statements shall not alone be sufficient evidence to charge any person with liability. The prosecution did not examine anyone even to show that the books of account were regularly kept in the course of business nor indeed was any attempt made to lead evidence apart from the production of books of account to prove the entrustment of the amount to the appellant."

40. Mr.Thakkar then relied upon the judgment in - *Smt. Chandrakantaben J. Modi and Narendra Jayantilal Modi versus Vadilal Bapalal Modi and others, AIR 1989 Supreme Court, 1269.* The Supreme Court held as under:-

> "14. It is apparent from the evidence that nobody takes the responsibility of supporting the correctness of the entries in the account books. When they were produced in Court the plaintiff filed his objection as per his purshis, Ext.172 (page 368 of the paper book), Many of the documents produced by the defendant No.1 were accepted, but the account books which were serial Nos.123-75 to 123-97 of the list Ext.123 were in express terms not admitted. The plaintiff said that they might be exhibited, but subject to his objection. The defendant No.6 also filed her objection as per the purshis Ext.275. The plaintiff did not make any statement supporting

> the books in his examination in chief and only in reply to the question of the cross-examining lawyer of the defendant No.1, he stated as mentioned earlier. It is significant to note that by saying that he had written as per the instructions of the defendant No.1. he made it clear that he could not vouchsafe for their reliability. In spite of this situation, the defendant No.1 could not summon courage to support them either personally or through any witness. No reason has been suggested at all on his behalf as to why he did not produce the other important documents in his possession which would have supported the account books and the joint case of the parties resisting the appellants' claim. In view of all these circumstances we have no hesitation in rejecting the account books as not reliable."

41. The judgment supports Mr.Thakkar's submission. In the present case also, the entries have not been supported with any oral evidence. The persons who made the entries, namely the witness' father, was a partner in the new firm and a party to the present proceedings. Despite the same, he was not examined. The witness who claims to have been involved in the business during the life time of the deceased, has given no satisfactory explanation for the entries. In the circumstances, I am unable to read the entries in the manner in which Mr.Maniyar has invited me to do so.

42. Thus far therefore the evidence relied upon by the Defendants to prove the execution of the Deed of Partnership dated 11th January, 1980 is not only unsatisfactory but in fact militates against the Defendants' case. However, in addition thereto, there are compelling reasons to discard the Defendants' case in this regard altogether.

43. Mr.Thakkar submitted, with considerable force, that there was no explanation why the Deed of Partnership was executed by the deceased by affixing his left hand thumb impression. This argument finds greater force in the fact, as admitted by Fakhruddin, that the witness signed all the documents in connection with his business and banks in Gujarathi. Further Fakhruddin in his cross-examination admitted that the deceased did not know English. There is no evidence whatsoever either in the Deed of Partnership or otherwise which even remotely suggest that the Deed of Partnership dated 11th January, 1980 which is in English was translated.

44. The Defendants examined original Defendant No.1 in support of their case. Before I deal with her evidence, I must state that Mr.Maniyar fairly conceded

that if her deposition is to be accepted, it destroys the Defendants' case entirely. It most certainly does. The only question is whether I ought to rely upon her evidence at all. Mr.Maniyar submitted that his own clients' evidence sought to be discarded entirely as she expired on 8th May, 1988 before her examination-in-chief was completed. I do not agree.

45. It is necessary to set out the entire examination-in-chief of original Defendant No.1 as it destroys the Defendants case comprehensively.

> "I do not remember the exact date of my marriage. I say that I was married about 40 years back from today. After my marriage I was residing at Khokha Bazar, Bombay. At Khokha Bazar I was residing with my husband. Out of this marriage I had five daughters in all. Out of which one is dead. The name of the eldest daughter is Fatimabai. The name of my second daughter is Asmabai, and the names of the other two daughters are Khatijabai and Mariambai respectively. Asmabai is married, so also Khatijabai and Mariambai. After the marriage of the three daughters they started residing with their husband. My eldest daughter Fatimabai is also married.Fatimabai married to Abedealli. After the marriage of Fatimabai she continued to reside with me. Abedealli has only one son and his name is Fakhruddin. Fakhruddin is married. Fakhruddin has a daughter and a son. Fakhruddin his wife and two children

residing with me at Khokha Bazar, Bombay.

. Asmabai, Khatijabai and Mariambai have filed the Suit against me in this Court.

. My husband was carrying on the business of Umbrella. He was carrying on the above business at Jumma Masjid, Bombay. This business was being carried on form a Shop. It was a good shop. The shop had a mazzine floor. The mazzine floor consisted of two rooms. My husband was doing this business since my marriage. My husband was carrying on business of Umbrella for about three to four months in a year. Witness further adds that her husband was carrying on the business of Umbrellas for the whole year.

Q. Who else is carrying on business from the Shop ?

. (Mr.Shah objects on the ground that this is a leading question with itself suggests the answer and therefore the same cannot be asked.)

A. I do not remember.

. Since the time of the business the shop belonged to my husband. My husband was paying the rent of the said shop during his life time. The electricity charges were being paid out of the income of the shop by my husband.

Q. Were you in any way connected with your husband’s business ?

A. I used to have a business of greetings cards during the Diwali Festival.

Q. Were you doing the business

of Umbrellas also with your husband ?

(Mr.Shah objects on the ground that it is a leading question.)

A. I was not doing Umbrellas business with my husband.

Q. Was any document executed with your husband by you in respect of business ?

A. No.

. At the request of Mr.Maniar, Advocate for the Defendants matter adjourned to Wednesday the 20th April, 1988 at 5.30 P.M. to enable him to produce the document from the custody of the Court receiver.)"

46. There is no gainsaying that her evidence not only does not support the Defendants case but completely destroys it. Her answer to the last three questions establishes that she was not doing any business with the deceased and that she had not executed any document with the deceased.

47. Mr.Maniyar, however, submitted that the Court ought not to consider the evidence of original Defendant No.1. as she expired even before her examination-in-chief could be concluded. The Defendants were deprived a very valuable right of having her declared hostile. This situation requires

consideration of an important question viz. the effect of evidence of a party, who expires before the examination-in-chief is concluded.

48. The counsel were unable to invite my attention to any authorities on the point. There is no authority to suggest however that the evidence of a witness, who expires before his evidence concludes can in no circumstances be considered by the Court. The adverse party would certainly be entitled to contend that the evidence ought not to be accepted because, the witness having expired he is deprived of the opportunity of cross-examination. This too does not appear to be an absolute or inflexible rule. As it does not arise for consideration in this case, I refrain from expressing a final opinion on it. However, a party who produces the witness in support of his case, is not easily entitled to have the evidence erased altogether in all circumstances.

. Had the cross-examination even begun, the matter could have posed no difficulty at all. The cross-examiner could have stated that he did not wish to cross-examine the witness. In such a case, he would have been entitled to rely upon the evidence of the witness in examination-in-chief in support of his

case if in fact, the evidence supported the adverse parties case. In this case, the complication arises by virtue of the fact that even the examination-in-chief was not concluded.

49. Mr.Maniyar’s contention is that he appeared for both the Defendants. It was always open for him, on behalf of Defendant No.2, to disassociate her from Defendant No.1 and to have had her declared hostile. He relies upon Section 154 of the Indian Evidence Act, 1872, which reads as under :-

> **"Question by party to his own witness** - The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party".

50. As a general proposition of law, Mr.Maniyar’s submission is not incorrect. There could be a situation where Defendants supporting each other initially, may find it necessary to discontinue supporting each other for a variety of reasons. For instance one of the parties may decide to collude with the adverse party dishonestly harming the party whom he was thus far supporting. In such a case, it may be possible for a party to withdraw his support

to such party and make an application under Section 154 of the Indian Evidence Act, to have him declared hostile and cross-examine him.

51. However, in the facts and circumstances of this case, this argument is not available to Mr.Maniyar. Original Defendant No.1 and Defendant No.2 filed a common written statement. They were represented by a common advocate. Their interests were the same at least upto the date on which original defendant No.1 was examined i.e. 12.4.1988. It is pertinent to note that thereafter not one of the parties has ever stated in any pleadings, in any affidavit or in any part of the evidence that original Defendant No.1 deposed falsely in her examination-in-chief. Nor have they stated that on that date she was not capable of giving evidence. Nor have they stated that her evidence is unreliable for any reason. It is further pertinent to note that even after original Defendant No.1 expired on 8th May, 1988, Fakhruddin filed affidavits by way of examination-in-chief on 23rd September, 2002, 24th February, 2003, 4th March, 2003 and 28th November, 2003. Not once has he stated anything to the above effect.

52. Fakhruddin in paragraph 2 of his cross-examination, merely stated that original Defendant No.1 was 82-83 years old when her evidence was partly recorded. He did not suggest even at that stage that original Defendant No.1 was incapable of giving evidence for any reason whatsoever. Nor did he state that she had turned hostile or that she had made any false statement. Indeed, this was never the Defendant's case. It was merely argued by Mr.Maniyar across the bar.

53. Further, if this was the Defendants' case, they ought to have examined the witnesses' mother Defendant No.2 to indicate the reasons for the alleged hostility. Defendant No.2 i.e. Fakhruddin's mother was not examined. The reason given in that she was 75 years old. But nobody has said that she was incapable of giving evidence. Nobody has said that she was incapable of giving evidence on commission. Her mother, original Defendant No.1 was however, examined. Failure to examine her, itself leads to an adverse inference that if she had examined herself, her evidence would have been detrimental to the Defendants' case.

54. Original Defendant No.1 further stated that

her husband carried on the business and paid all expenses in relation thereto. There is nothing in her evidence that suggests that she is incapable of giving evidence effectively. She has stated in fact that she had her own business of greeting cards during the Diwali festival. Mr.Maniyar submitted that merely because original Defendant No.1 stated in her evidence that the deceased was paying the rent of the shop during his life time and that electricity charges were being paid out of the income of the shop by the deceased, it could not be inferred that, she was not her husband's partner in the firm. He based this submission on the premise that in India a woman can't be expected to engage in any business, or pay electricity bills. None of his clients have said so. None of his witnesses have said so. I am unable to understand on what basis Mr.Maniyar has developed this theory and on what basis he expects the Court to accept it. This rather unfortunate submission requires no further consideration.

55. In these circumstances, I am not inclined to disregard the evidence of original Defendant No.1. It virtually concludes the Defendants' case as regards the alleged execution of the Deed of Partnership dated 11th January, 1980.

56. Mr.Maniyar sought to rely upon the alleged estate duty forms. He is however not entitled to do so as the same were not marked in evidence. They are marked only for identification.

57. Mr.Maniyar then relied upon a second affidavit of Fakhruddin by way of his examination-in-chief in Suit No.709 of 1984 and submitted that he had furnished a cogent reason for the formation of the partnership only a few months before he expired. He stated that the deceased had become very old and that the Plaintiffs in suit No.603 of 1981 were against the deceased and his wife. He further stated that as the deceased was worried about his wife and fear that the Plaintiffs would not allow her to live in peace he took her as his partner in the said business. Apart from bare allegations, there are no particulars whatsoever which entitle me to hold that the same is sufficient evidence to prove execution of the Deed of Partnership.

58. Mr.Maniyar was however correct in contending that the evidence of Khatija Yusufji Bastawala - Plaintiff No.1, by itself would not disprove the

partnership deed for she admitted in paragraphs 11 and 14 of her cross-examination that she was not aware about the same. She had not even taken inspection of the partnership deed. However, it was not necessary for Mr.Thakkar to rely upon the evidence of Plaintiff No.1 in view of what I have held above.

59. Mr.Thakkar did not press issue No.2 in Suit No.709 of 1984.

60. The Defendants' difficulties, however, do not end here. Mr.Thakkar submitted with considerable force that there was a total absence of any evidence to prove that the tenancy rights were in fact brought into the partnership stock. Thus even assuming that on 11th January, 1980 , a Deed of Partnership was executed, that by itself would not advance the Defendants' case regarding the question whether the tenancy rights of the deceased in the shop were brought into the partnership. Mr.Maniyar conceded that the only basis on which the Defendants' case rests in this regard is the wording of clause 9 of the Deed of Partnership. It would be convenient therefore at this stage to consider the Deed of Partnership dated 11th January, 1980.

61. The recital to the Deed of Partnership states that in the said premises, the deceased carried on business as a sole proprietor in the firm name and style of M/s.Kurbanhusein Tyaballi and that he had agreed to take his wife as his partner on the terms and conditions mentioned therein. Clause 1 provides that the business shall be carried on in the name and style of M/s.Kurbanhusein Tyaballi & Co. The shares of the parties in the profit and/or loss of the partnership business shall be equal. Clauses 2, 8 and 9 read as under :-

> "2. That the Partnership business will be that of dealing in Umbrellas and manufacturing thereof and the same shall be carried on in the shop premises on the ground floor at 246, Janjikar Street, Near Juma Masjid, Bombay-400 002. The parties hereto may also carry on business at any other place or places as the parties may mutually decide and agree upon the same.
>
> 8. It has been agreed that death of any one of the partners herein shall not dissolve the Partnership but the share of such deceased partner shall be taken over by the surviving partner.
>
> 9. On dissolution of the Partnership each partner will have equal share in the assets, paraphernalias and goodwill of the said business, including the benefits of the tenancy rights of

the said premises."

62. The mere fact that the deceased agreed that the business of the partnership shall be carried on in the said premises, did not make the premises or any right therein a property of the firm. The document does not expressly transfer the right of the deceased in the said premises to the partnership firm.

63. There is no presumption in law that a partner's individual property is the property of the firm merely because the firm uses the same. Mr.Thakkar relied upon the judgment in *Arjun Kanoji Tankar versus Santaram Kanoji Tankar, 1969 (3) Supreme Court Cases, 555.* The Supreme Court in paragraph 13 held thus :-

> "13. Counsel for the defendant contends that in any event by virtue of Section 14 of the Partnership Act, 1932, all the assets with aid of which the business was carried on by the plaintiff must be deemed in law to have become partnership assets, under the deed of partnership, dated March 16, 1953. Section 14 of the Partnership Act, 1932 provides :
>
> > "Subject to contract between the partners, the property of the firm includes all property and

> rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business."

Property belonging to a person, in the absence of an agreement to the contrary, does not, on the person entering into a partnership with others, become the property of the partnership merely because it is used for the business of the partnership. It will become property of the partnership only if there is an - agreement express or impliedth - at the property was, under the agreement of partnership, to be treated as the property of the partnership.

In Lindley on Partnership, 12th Edn., it is stated at p. 365 :

> "Again, it by no means follows that property used by all the partners for partnership purposes is partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to lease to the firm, or without any lease at all.
>
> If, however, a partner brings such property into the common stock as part of his capital it becomes partnership property, and any increase in its value will belong to the firm.

> the only true method of determining as between the partners themselves what belongs to the firm, and what not, is to ascertain what agreement has been come to upon the subject. But this is by no means always an easy matter."

We are unable to agree with counsel for the defendant that whenever there is a partnership and the assets which originally belonged to one of the partners are used for the purposes of the partnership, they must be presumed to have become partnership assets. In *Miles v. Clarke* the defendant started the business of a photographer and then admitted the plaintiff - a successful free lance photographer - as a partner. The leasehold premises, furniture and studio equipment belonged to the defendant. It was intended to record the terms of partnership into a formal agreement, but no terms were ever settled, except that the partners were to share the profits equally. On dissolution of the partnership it was held that no terms ought to be implied except such as were essential to business efficacy and that only the consumable items of stock-in-trade were to be regarded as assets of the partnership, and the lease of the property, equipment and personal goodwill were to be treated as being the property of the partners who brought them into the business."

. Mr.Thakkar reliance upon the above judgment is well founded.

64. Mr.Maniyar, however, submits that clause 9 implies that the rights of the deceased in the said premises stood transferred to the firm for otherwise there was no need for the parties to provide that each partner would have an equal right in the tenancy rights of the said premises. I do not suggest for a moment that Mr.Maniyar's submission is totally unfounded. The words "said premises" would indicate the premises referred to earlier in the document. In clause 2, there is a reference to the suit premises. But that does not by itself indicate an intention on the part of the deceased to have brought the tenancy rights into the partnership with an intention of divesting himself of all right, title and interest therein. Original Defendant No.1 has not even suggested in her evidence that the right of the deceased in the premises was brought into the partnership firm.

65. Mr.Thakker submitted that the tenancy rights by themselves could not have been brought into the partnership firm in view of the provision of Section 15 of the Bombay Rent Act. Under the notification dated 24th September, 1998, the tenancy rights could be transferred or assigned only as under :-

> . "The Government of Bombay has permitted in all areas to which Part II of this Act extends all transfers and assignments by lessees of their interests in leasehold premises as, and to the extent, specified in the Schedule as under :-
>
> (2). Transfer or assignment incidental to the sale of a business as a going concern together with the stock-in-trade and the goodwill thereof, provided that the transfer or assignment is of the entire interest of the transferor or assignor in such leasehold premises together with the business and the stock-in-trade and goodwill thereof."

. It is a moot point whether I can hold the transfer as void assuming that it has not been in accordance with the circular not at the instance of the landlord but at the instance of a third party. As I have not had the benefit of the assistance from the counsel on this point, I refrain from deciding it. This is more so as it is a question of law of general importance. Moreover, it is not necessary for me to decide this issue as in any event I have held that there was no transfer of tenancy rights by the deceased to the alleged partnership firm.

66. In the circumstances, it must be held that the alleged Deed of Partnership dated 11th January,

1980 was not executed. Even assuming that it was executed, the deceased did not transfer his tenancy rights in the suit property to the partnership firm.

ISSUE NOS.4 AND 5 IN SUIT NO.709 OF 1984 :

67. The question to be considered here is the effect of the death of the deceased on the partnership firm constituted under the Deed of Partnership dated 11th January, 1980 assuming it was entered into. Admittedly on the date of the death of the deceased, there were only two partners in the firm.

68. Mr.Maniyar submitted that as per clause 8 of the Deed of Partnership, upon the death of the deceased, the firm did not stand dissolved but that original Defendant No.1 as a surviving partner, took over the share of the deceased. Thereafter Plaintiff Nos.2, 3 and 4 in Suit No.709 of 1984, carried on business in the name and style of Plaintiff No.1 in the suit premises. Founding himself on the basis that the tenancy rights of the deceased were transferred to the partnership firm constituted on 11th January, 1980 and on the basis that upon the death of the deceased, his share in that firm including the said tenancy rights in the said premises stood transferred he

submitted that the tenancy rights were taken over by original Defendant No.1. He submitted that original Defendant No.1 was entitled to deal with the same in any manner that she desired. Accordingly, he submitted that original Defendant No.1 transferred her rights in the said premises to the new firm i.e. Plaintiff No.1 in Suit No.709 of 1984 constituted under the Deed of Partnership dated 10th January, 1981 (Exhibit - 9).

69. In fact a perusal of Exhibit-9 does not indicate that original Defendant No.1 transferred her alleged right in the said premises to Plaintiff No.1 in Suit No.709 of 1984.

70. Clause 8 of the Deed of Partnership dated 11th January, 1980 contemplates a situation where a partnership firm does not stand dissolved. It does not deal with a situation where the firm stands dissolved. Such a situation is contemplated only by clause 9. This is the only way in which the two clauses can be read harmoniously. In the present case it is clause 9 that will govern the rights of the parties. This is for the reason that by virtue of the provisions of the Indian Partnership Act, the partnership firm constituted under the Deed of

Partnership dated 11th January, 1980 stood dissolved on the death of the deceased. It stood dissolved by virtue of the fact that upon the death of the deceased, original Defendant No.1 was the sole surviving partner. A partnership predicates at least two parties to constitute it.

71. Mr.Maniyar, to rebutt this position, relied upon the provisions of Section 42 (c) of the Indian Partnership Act, which reads as under :-

> "**Dissolution on the happening of certain contingencies. -**
>
> Subject to contract between the partners a firm is dissolved, -
>
> (a) .....
>
> (b) .....
>
> (c) by the death of a partners ; and"

72. It is true that clause 8 of the Deed of Partnership dated 11th January, 1980 is a contract to the contrary and therefore, the death of a partner would not dissolve the firm. That, however, is provided there were at least two partners even after the death of one of the partners. In the present case, clause 8 of the Deed of Partnership dated 11th

January, 1980 and Section 42(c) of the Indian Partnership Act would not keep the partnership firm for being dissolved. This is clear from the judgment of the Supreme Court in the case of - *Commr. of Income-tax Madhya Pradesh, Nagpur and Bhandara, Nagpur (In both the appeals) versus Seth Govindram Sugar Mills (In both the Appeals), AIR 1966 Supreme Court 24.* In paragraphs 7, 8 and 9 the Supreme Court held thus :

> "7. There is a fallacy in this argument. Partnership, under S. 4 of the Partnership Act, is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Section 5 of the said Act says that the relation of partnership arises from contract and not from status. The fundamental principle of partnership, therefore, is that the relation of partnership arises out of contract and not out of status. To accept the argument of the learned counsel is to negative the basic principle of law of partnership. Section 42 can be interpreted without doing violence either to the language used or to the said basic principle. Section 42 (c) of the Partnership Act can appropriately be applied to a partnership where there are more than two partners. If one of them dies, the firm is dissolved but if there is a contract to the contrary, the surviving partners will continue the firm. On the other hand,if one of the two partners of a firm dies, the firm automatically comes to an

end and, thereafter there is no partnership for a third party to be introduced therein and, therefore, there is no scope for applying cl. (c) of S. 42 to such a situation. It may be that pursuant to the wishes or the directions of the deceased partner the surviving partner may enter into a new partnership with the heir of the deceased partner, but that would constitute a new partnership. In this light S. 31 of the Partnership Act falls in line with S. 42 thereof.That section only recognizes the validity of a contract between the partners to introduce a third party without the consent of all the existing partners; it presupposes the subsistence of a partnership ; it does not apply to a partnership of two partners which is dissolved by the death of one of them, for in that event there is no partnership at all for any new partner to be inducted into it without the consent of others.

8. There is a conflict of judicial decisions on this question. The decision of the Allahabad High Court in *Ram Kumar v. Kishori Lal, AIR 1946 All 259*, is not of any practical help to decide the present case. There, from the conduct of the surviving partner and the heirs of the deceased partner after the death of the said partner, the contract between the original partners that the partnership should not dissolved on the death of any of them was inferred. Though the partnership there was only between two partners, the question of the inapplicability of S.42 (c) of the Partnership Act to such a partnership was neither raised nor decided therein. The same criticism applies to the decision of the Nagpur High Court in *Chainkaran Sidhakaran v. Radhakisan*

Vishwanath, AIR 1956 Nag. 46. This question was directly raised and clearly answered by a Division Bench of the Allahabad High Court in *Mt.Sughra v. Babu, AIR 1952 All 506 at p.507* against the legality of such a term of a contract of partnership consisting of only two partners. Agarwala, J., neatly stated the principle thus ;

. "In the case of a partnership consisting of only two partners, no partnership remains on the death of one of them and, therefore, it is a contradiction in terms to say that there can be a contract between two partners to the effect that on the death of one of them the partnership will not be dissolved but will continue ..... Partnership is not a matter of status, it is a matter of contract. No heir can be said to become a partner with another person without his own consent express or implied."

This view accords with that expressed by us earlier. In *Narayanan v. Umaval, AIR 1959 Mad.283 at p. 284,* Ramchandra Iyer, J., as he then was, said much to the same effect when he observed thus :-

"..... if one of the partners died, there will not be any partnership existing to which the legal representatives of the deceased partner could be taken in. In such a case the partnership would come to an end by the death of one of the two partners, and if the legal representatives of the deceased partner joins in the business later, it should be referable to a new partnership between them."

But Chatterjee, J., in *Hansraj Manot v. Gorak Nath Pandey, 66 Cal. WN 262 at p. 264*, struck a different

note. His reasons for the contrary view are expressed thus :-

"Here the contract that has been referred to is the contract between the two partners Gorak Nath and Champalala ..... Therefore, it cannot be said that the contract ceased to have effect because a partner died. The contract was there. There was no new contract with the heirs and there was no question of a new contract with the heirs because of the original contract, and by virtue of the original contract the heirs become partners as soon as one of the partners died..... As soon as there is the death, the heirs become the partners automatically without any agreement between the original partners by virtue of the original agreement between the partners while they were surviving. There is no question of interregnum. As soon as the death occurs the right of somebody else occurs. The question of interregnum does not arise. The heirs become partners not because of a contract between the heirs on the one hand and the other partners on the other but because of the contract between the original partners of the firm." With great respect to the learned Judge, we find it difficult to appreciate the said reasons. The learned Judge seems to suggest that by reason of the contract between the original partners, the heirs of the deceased partner enter the field simultaneously with the removal by death of the other partner from the partnership. This implies that personality of the deceased partner projects into that of his heirs, with the result that there is a continuity of the partnership without any interregnum. There is no support either on authority or on principle for such a legal position.

> In law and in fact there is an interregnum between the death of one and the succession to him. We accept the view of the Allahabad and Madras High Courts and reject the view expressed by Nagpur and Calcutta High Courts.
>
> 9. The result of the discussion is that the partnership between Nandlal and Bachhulal came to an end on the death of Nandlal on December 9, 1945."

73. In the result, even assuming that the Deed of Partnership dated 11th January, 1980 was admittedly entered into and that the deceased brought his rights in respect of the said premises into the partnership, upon his death his estate would be entitled under clause 9 of the Deed of Partnership to a 50% share in the assets of the firm including the benefits of tenancy rights in respect of the said premises.

ISSUE NO.5 IN SUIT NO.603 OF 1981 AND ISSUE NO.9 OF SUIT NO.709 OF 1984 :

74. There is no evidence to substantiate these issues. They are accordingly answered in the negative.

ISSUE NO.1 IN SUIT NO.603 OF 1981 :

75. Mr.Maniyar submitted that the suit lacks a cause of action. This he submitted on the basis that there was a full and final settlement upon the death of the deceased between the members of the family. There is no issue on the question of full and final settlement between the parties. In any event, there is no cogent evidence to substantiate the case of a full and final settlement. Fakhruddin in his examination-in-chief alleged that a full and final settlement by which a sum of Rs.71,000/- in addition to the value of "Karim Building" would constitute the estate of the deceased was entered into. There are no particulars whatsoever of this alleged agreement. There are no details of when it was arrived at. There are no details of any sort including the persons who are the parties to the said settlement. The issue is therefore, answered in the negative.

ISSUE NO.2 IN SUIT NO.603 OF 1981 :

76. This issue is not pressed.

ISSUE NO.1 IN SUIT NO.709 OF 1984 :

77. Not necessary to be decided in view of the finding on the other issues.

ISSUE NO.6 IN SUIT NO.709 OF 1984 :

78. Mr.Maniyar fairly conceded that there was no evidence in support of the claim for damages. The issue is therefore, answered in the negative.

ISSUE NO.6 IN SUIT NO.603 OF 1981 :

79. The shares of the parties in the estate of the deceased are determined as under :-

i). The estate of original Defendnat No.1 is entitled to a one eighth share.

ii). The original Plaintiffs are entitled to share the remaining estate equally.

ISSUE NO.7 IN SUIT NO.603 OF 1981 AND ISSUE NO.11 IN SUIT NO.709 OF 1984 :

80. As per the preliminary decree.

81. None of the assets of the deceased form a part of the first Plaintiff firm.

82. In the circumstances, the following preliminary administration decree is passed -

i). Decree in terms of prayers (a) to (c) and (i). The preliminary decree shall incorporate and be drawn up in accordance with the provisions of Order XXI Rule 13 of the Code of Civil Procedure.

ii). It is declared that the branch of original Defendant No.1 is entitled to a 1/8th share in the estate of the deceased.

iii). It is declared that the branches of the original Plaintiffs and of original Defendant No.2 are entitled to or equal share of 25% each in the remaining estate of the deceased.

iv). It is declared that "Karim Building" referred to in paragraph 4 of the plaint forms part of the estate of the deceased.

v). It is declared that all the assets including the goodwill of the business that the deceased carried on in the name and style of M/s.Kurbanhusein Tyaballi including the

tenancy rights in the said premises viz. shop No.246 Janjikar Street, Crawford Market, (near Jumma Masjid) Mumbai form part of the assets of the deceased.

vi). The Commissioner for taking accounts shall proceed to ascertain the estate of the deceased and quantify the shares of the branches of the parties mentioned below.

vii). The Court Receiver of this Court is appointed as Receiver of the estate of the deceased. The Receiver shall sell the estate of the deceased by public auction. Liberty to the parties to bid.

viii). Liberty to the Court Receiver and to the parties to apply for directions for payment of the dues of the estate if any before the final decree.

ix). After all properties of the estate of the deceased have been sold, the Receiver and the Commissioner for taking accounts shall submit a report ascertaining the shares of the aforesaid branches. The report shall take

into account all amounts that may be found due to the estate including from the parties/original parties to the two suits.

x). The costs of the parties shall be decided at the stage of hearing/the final decree.

xi). Liberty to the parties to apply.

83. Suit No.709 of 1984 is dismissed with costs.

. Parties to act on an ordinary copy of this order duly authenticated by the Associate/Court Stenographer of this Court.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.603 OF 1981
WITH
SUIT NO.709 OF 1984

DATE OF DECISION : 5TH/6TH AUGUST 2004.

For Approval and Signature :

HON'BLE MR.JUSTICE S.J. VAZIFDAR.

1. Whether Reporters of Local Papers may be allowed to see the judgement ?)

2. To be referred to the Reporter or not ?)